

## REMARKS

This Amendment is submitted in response to the non-final Office Action mailed on February 22, 2010. A petition for a one month extension of time is submitted herewith. The Director is authorized to charge \$130.00 for the Petition for a one month extension of time and any additional fees that may be required, or to credit any overpayment to Deposit Account No. 02-1818. If such a withdrawal is made, please indicate the Attorney Docket No. 3712036-00717 on the account statement.

Claims 1-21 are pending in this application. Claims 22-24 were previously canceled without prejudice or disclaimer. In the Office Action, Claims 1-2, 4 and 7 are rejected under 35 U.S.C. §102, and Claims 3, 5-6 and 8-21 are rejected under 35 U.S.C. §103. In response, Claims 1, 4 and 7 have been amended and Claims 3 and 6 have been canceled without prejudice or disclaimer. The amendments do not add new matter and are supported in the specification at, for example, page 6, [0024] and [0026]. In view of the amendments and/or for the reasons set forth below, Applicants respectfully submit that the rejections should be reconsidered and withdrawn.

### **35 U.S.C. §102(b) Rejection**

In the Office Action, Claims 1-2, 4 and 7 are rejected under 35 U.S.C. §102(b) as being anticipated by U.S. Patent No. 6,217,929 to Hahn ("*Hahn*"). In view of the amendments, and/or for at least the reasons set forth below, Applicants respectfully request that the rejection be reconsidered and withdrawn.

Currently amended independent Claims 1, 4 and 7 recite, in part, mixtures that are fluid and stable for several weeks in refrigerated form, the mixtures including a continuous mixture phase comprising flour, water, and sugar, and at least one source of fat present in the form of discrete particles distributed in the continuous phase of the mixture, wherein the source of fat in the form of discrete particles represents at least 60% of the total fat contained in the mixture, and wherein the mixture has a flowability when measured by a Bostwick Consistometer after 40 seconds of between about 6 cm and about 12 cm at a temperature of 8 °C. The amendments are supported in the specification at, for example, page 6, [0024] and [0026]. In contrast, Applicants respectfully submit that *Hahn* fails to disclose or suggest a number of elements of independent Claims 1, 4 and 7.

Chocolate fondant cakes are characterized by their crisp pastry exterior and fluid, runny or fondant melted chocolate interior. Such cakes are laborious to prepare because they involve melting chocolate and fat, two mixing steps, and the use of many kitchen accessories. Conventional ready-to-cook mixtures have been developed to help reduce the preparation time of such cakes. However, conventional ready-to-cook mixtures transform into compact blocks that are very difficult or impossible to pour once they are refrigerated.

An advantage of embodiments of the claimed mixture is that they include a source of fat and can still maintain a liquid form at a temperature of 8 °C. This allows the simple preparation, for example, of a fondant cake by pouring the refrigerated mixture into a mold and cooking in a standard oven. In contrast, Applicants submit that *Hahn* fails to disclose or suggest each and every element of the present claims.

*Hahn* fails to disclose or suggest ready-to-use mixtures that are fluid and stable for several weeks in refrigerated form, the mixtures including a continuous mixture phase comprising flour, water, and sugar, and at least one source of fat present in the form of discrete particles distributed in the continuous phase of the mixture, wherein the source of fat in the form of discrete particles represents at least 60% of the total fat contained in the mixture, and wherein the mixture has a flowability when measured by a Bostwick Consistometer after 40 seconds of between about 6 cm and about 12 cm at a temperature of 8 °C as required by independent Claims 1, 4 and 7. In fact, the Patent Office even admits that *Hahn* fails to disclose or suggest the presently claimed amounts of the source of fat. See, Office Action, page 5, lines 8-10. Instead, *Hahn* discloses a batter that has about 5 to 20% shortening or oil, which is well below the presently claimed amount of at least 60% of the total fat. As such, it is clear that *Hahn* fails to disclose or suggest the present amounts of a source of fat in the form of discrete particles as claimed in independent Claims 1, 4 and 7.

Further *Hahn* also fails to disclose or suggest a fluid, ready-to-use mixture having a flowability when measured by a Bostwick Consistometer after 40 seconds of between about 6 cm and about 12 cm at a temperature of 8 °C as required by independent Claims 1, 4 and 7. The Patent Office asserts that *Hahn* discloses a batter mixture “identical in composition to that presently claimed, including fat in the form of discrete particles (i.e., chocolate particles and/or butter)” and that since the compositions are allegedly “identical,” the batter of *Hahn* “would

inherently have a flowability” that is the same as presently claimed. See, Office Action, page 3, lines 3-6. Applicants respectfully disagree.

In the present specification, “fluid” is explicitly defined as meaning that “the mixture can be poured from its packaging into a mold easily, that is to say also that it can flow by itself without any excessive external constraint.” See, specification, page 4, paragraph [0019]. The present specification also explicitly connects the “fluidity” to the Bostwick consistency by stating in the next sentence that “the mixture according to the invention may be characterized by its Bostwick consistency.” See, *Id.* Thus, surprisingly, Applicants have found that using “some of the fat in the form of discrete particles distributed in the mixture rather than in diffuse and continuous form makes it possible to obtain a mixture whose fluidity is satisfactory to make it pourable.” See, specification, page 4, [0017]. This is in direct contrast to the disclosure of *Hahn*, which fails to disclose or suggest a “fluid” or “pourable” batter having the presently claimed Bostwick consistency.

For example, *Hahn* explicitly defines “spoonable” as meaning “that the consumer can readily spoon or scoop the batter from the container.” See, *Hahn*, column 5, lines 47-49. Indeed, *Hahn* only discloses the use of the batter by “spooning” and fails to disclose that the batter can be fluid and pour on its own without external manipulations and pressures. *Hahn* goes even further to distinguish the consistency of its batters by stating that batters in the prior art “are thinner and less viscous than conventional batters” and that “[t]he batters of the invention, however, are thicker and more viscous than conventional batters, but not as viscous as doughs.” See, *Hahn*, column 10, lines 39-51.

As such, it is clear that the batter of *Hahn* is not fluid or pourable, as is explicitly discussed in the *Hahn* reference and, therefore, cannot inherently have the same Bostwick consistency as is presently claimed. Further, to satisfy the test for inherency, the Patent Office would be required to show that the batter of *Hahn* necessarily (i.e., always or automatically) has the presently claimed Bostwick consistency. That condition simply is not met under the present circumstances. The fact that a certain result or characteristic may occur or be present in the prior art is not sufficient to establish the inherency of that result or characteristic. See, MPEP 2112. In re Rijckaert, 9 F.3d 1531, 1534 (Fed. Cir. 1993).

Further, anticipation is a factual determination that “requires the presence in a single prior art disclosure of each and every element of a claimed invention.” *Lewmar Marine, Inc. v.*

*Barient, Inc.*, 827 F.2d 744, 747 (Fed. Cir. 1987) (emphasis added). Federal Circuit decisions have repeatedly emphasized the notion that anticipation cannot be found where less than all elements of a claimed invention are set forth in a reference. See, e.g., *Transclean Corp. v. Bridgewood Services, Inc.*, 290 F.3d 1364, 1370 (Fed. Cir. 2002). As such, a reference must clearly disclose each and every limitation of the claimed invention before anticipation may be found. Indeed, the Patent Office must be able to specifically identify the disclosure of each and every limitation of the claimed invention before anticipation may be found. Instead, Applicants respectfully submit that the Patent Office even admits that *Hahn* fails to disclose or suggest each and every element of the present claims. See, Office Action, page 5, lines 8-10.

For at least the reasons discussed above, *Hahn* fails to disclose or even suggest each and every element of independent Claims 1, 4 and 7, and thus, fails to anticipate Claims 1, 4 and 7, along with the claims that depend from Claims 1, 4 and 7. Accordingly, Applicants respectfully request that the rejection of the pending claims under 35 U.S.C. §102(b) be reconsidered and withdrawn.

### **35 U.S.C. §103(a) Rejection**

In the Office Action, Claims 3, 5, 6 and 8-21 are rejected under 35 U.S.C. §103(a) as being unpatentable over *Hahn*. Applicants respectfully submit that the patentability of Claims 1, 4 and 7 as previously discussed renders moot the obviousness rejection of Claims 3, 5-6 and 8-21 that depend from Claims 1, 4 and 7. In this regard, the cited art fails to teach or suggest the elements of Claims 3, 5-6 and 8-21 in combination with the novel elements of Claims 1, 4 and 7.

Further, as discussed previously, *Hahn* fails to disclose or suggest a mixture wherein a source of fat in the form of discrete particles represents at least 60% of the total fat contained in the mixture, and wherein having a flowability when measured by a Bostwick Consistometer after 40 seconds of between about 6 cm and about 12 cm at a temperature of 8 °C as required by Claims 1, 4 and 7. In fact, *Hahn* explicitly teaches that the doughs of his invention are “spoonable” and are “thicker and more viscous than conventional batters,” which are, in turn, still more viscous than “thinner and less viscous” batters that are “pourable.” Because the present claims are directed to batters that are “fluid” and “pourable,” as characterized by the presently claimed Bostwick consistency, Applicants respectfully submit that *Hahn* cannot

disclose the presently claimed Bostwick consistency and that the present claims are novel and nonobvious in view of *Hahn*.

Accordingly, Applicants respectfully request that the rejection of Claims 3, 5-6 and 8-21 under 35 U.S.C. §103(a) be reconsidered and withdrawn.

For the foregoing reasons, Applicants respectfully request reconsideration of the above-identified patent application and earnestly solicit an early allowance of same. In the event there remains any impediment to allowance of the claims that could be clarified in a telephonic interview, the Examiner is respectfully requested to initiate such an interview with the undersigned.

Respectfully submitted,

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